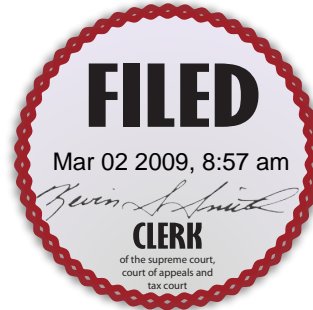


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAVID NIBBS,

Appellant-Defendant,

V.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0807-CR-653

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Barbara A. Collins, Judge  
Cause No. 49F08-0802-CM-026503

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**March 2, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

## **BAKER, Chief Judge**

Appellant-defendant David Nibbs appeals his conviction and sentence for Operating a Vehicle While Intoxicated,<sup>1</sup> a class A misdemeanor. Specifically, Nibbs argues that there was insufficient evidence to prove beyond a reasonable doubt that he operated a vehicle while intoxicated. Finding no error, we affirm the judgment of the trial court.

### FACTS

On December 19, 2007, Officer Gary Toms of the Indianapolis Metropolitan Police Department (IMPD) observed Nibbs's vehicle speeding with two flat tires on the driver's side. Officer Toms initiated a traffic stop and noticed that Nibbs had glassy and bloodshot eyes, slurred speech and poor manual dexterity. Officer Toms concluded that Nibbs had been drinking alcohol and called for a "D.U.I car." Tr. p. 8-9.

Sergeant William Weber from the IMPD's D.U.I. unit arrived on the scene and smelled alcohol on Nibbs's breath. In addition, Sergeant Weber noticed that Nibbs's eyes were bloodshot and that he staggered and leaned against his car as he exited his vehicle. After Nibbs was read his Miranda<sup>2</sup> rights, Nibbs informed Sergeant Weber that he had consumed five beers that evening and that his last beer had been consumed about an hour before he was stopped by Officer Toms.

Sergeant Weber performed the horizontal gaze nystagmus sobriety test (H.G.N) on Nibbs, and he showed six out of a possible six clues of intoxication, indicating that Nibbs had

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<sup>1</sup> Ind. Code § 9-30-5-2.

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

a blood alcohol level at or above .08 percent. When Sergeant Weber attempted to conduct additional sobriety tests, Nibbs admitted that he would fail because he was drunk. Id. at 21. Even after being informed of Indiana’s Implied Consent Law,<sup>3</sup> Nibbs still refused to take a breathalyzer test or to have his blood drawn. However based upon Nibbs’s admissions, bloodshot eyes, lack of balance, driving behavior, and performance on the H.G.N., Sergeant Weber concluded that Nibbs was intoxicated and arrested him.

On February 11, 2008, the State charged Nibbs with Count I, operating a vehicle while intoxicated, a class A misdemeanor; Count II, operating a vehicle with a blood alcohol content at or more than .15 percent,<sup>4</sup> a class A misdemeanor; and Count III, driving while suspended, a class A misdemeanor.<sup>5</sup> At the bench trial, which commenced on June 17, 2008, the trial court found Nibbs guilty of operating a vehicle while intoxicated and sentenced him to 365 days on probation and 360 hours of community service work. Nibbs now appeals.

### DISCUSSION AND DECISION

Nibbs argues that there was insufficient evidence to prove beyond a reasonable doubt that he committed class A misdemeanor, operating a vehicle while intoxicated. When reviewing a challenge to the sufficiency of the evidence, this court will consider only the evidence favorable to the verdict and the reasonable inferences to be drawn therefrom. Walsman v. State, 855 N.E.2d 645, 648 (Ind. Ct. App. 2006). We will neither reweigh the

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<sup>3</sup> I.C. § 9-30-6-1 (providing that “[a] person who operates a vehicle impliedly consents to submit to the chemical test provisions of this chapter as a condition of operating a vehicle in Indiana”).

<sup>4</sup> I.C. § 9-30-5-1(b).

<sup>5</sup> Ind. Code § 9-24-19-2.

evidence nor judge the credibility of witnesses and will affirm the conviction “if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt.” Id.

Indiana Code section 9-30-5-2 provides in relevant part:

(a) Except as provided in subsection (b), a person who operates a vehicle while intoxicated commits a Class C misdemeanor.

(b) An offense described in subsection (a) is a Class A misdemeanor if the person operates a vehicle in a manner that endangers a person.

Thus, to convict Nibbs of operating a vehicle while intoxicated as a class A misdemeanor, there had to be sufficient evidence that Nibbs was intoxicated while operating a vehicle in manner that endangers a person. Nibbs maintains that there was insufficient evidence to establish the elements of intoxication and endangerment.

Alcohol intoxication is defined by Indiana Code section 9-13-2-86 as being under the influence of alcohol “so that there is an impaired condition of thought and action and the loss of normal control of a person’s faculties.” This court has held that an impaired condition may be established through evidence of: “1) consumption of significant amounts of alcohol; 2) impaired attention and reflexes; 3) watery or bloodshot eyes; 4) the odor of alcohol on the breath; 5) unsteady balance; 6) failed field sobriety tests; and 7) slurred speech.” Fields v. State, 888 N.E.2d 304, 307 (Ind. Ct. App. 2008) (citing Ballinger v. State, 717 N.E.2d 939, 943 (Ind. Ct. App. 1999)).

In the instant case, Sergeant Weber testified that Nibbs's eyes were bloodshot, he staggered when he exited his vehicle, and his breath smelled of alcohol. Tr. p. 18. In addition, Sergeant Weber stated that Nibbs showed six out of six clues of intoxication when he was given the H.S.N., indicating that Nibbs had a blood alcohol level of .08% or greater. Id. at 24-25. Furthermore, Nibbs admitted to Sergeant Weber that he had consumed five beers that evening, with the last one being consumed just one hour before he was stopped. Id. at 20. Moreover, Sergeant Weber testified that when he tried to give Nibbs additional sobriety tests, Nibbs told him that "he knew he was going to fail them because he knew that he was drunk." Id. at 21. Under these circumstances, we cannot say that there was insufficient evidence to show that Nibbs was intoxicated. See Dunkley v. State, 787 N.E.2d 962, 965 (Ind. Ct. App. 2003) (concluding that sufficient evidence of intoxication existed where the defendant had slurred speech, bloodshot eyes, poor dexterity, smelled strongly of alcohol and failed two sobriety tests).

Nibbs also argues that there was insufficient evidence to prove that he was operating a vehicle in "a manner that endangers a person." I.C. § 9-30-5-2(b). "The element of endangerment is proved by evidence that the defendant's condition or manner of operating the vehicle could have endangered any person, including the public, police, or the defendant." Weaver v. State, 702 N.E.2d 750, 753 (Ind. Ct. App. 1998).

In the instant case, Officer Toms testified that Nibbs was speeding while his vehicle had two flat tires. Tr. p. 4-5. In addition, as stated above, there was sufficient evidence to

prove that Nibbs was intoxicated when he operated the vehicle. In sum, the manner in which Nibbs was driving and his intoxicated condition are sufficient to prove endangerment.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.